In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 97

WILLIAM A. GOODLOE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 55-56) is reported at 188 F. 2d 621.

JURISDICTION

The judgment of the Court of Appeals was entered on December 14, 1950 (R. 57),[1] and a petition for a rehearing (R. 58-61) was denied *en banc*

[1] The symbol "R." refers to the printed joint appendix and "Tr." to the original stenographic transcript of record.

on May 11, 1951 (R. 62). The petition for a writ of certiorari was filed on June 5, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether allowing a juror to take notes is within the discretion of the trial court.

2. Whether cross-examination, otherwise relevant and proper, is prejudicial because it refers to the color of people.

3. Whether in reviewing the evidence in his charge to the jury the trial judge exceeded the authority given to federal judges in such matters.

4. Whether the granting of an instruction cautioning the jury regarding the testimony of the complaining witness in an abortion case is within the discretion of the trial court.

5. Whether the trial court can interrogate a juror who dissents in a poll of the jury, where it appears that the juror thought he was being asked how he voted on the first ballot in the jury room.

RULE INVOLVED

Rule 31(d) of the Federal Rules of Criminal Procedure provides:

> When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unani-

mous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

STATEMENT

Petitioner was tried alone and convicted on three counts of an indictment which (1) accused petitioner alone of using instruments and medicine with intent to procure an abortion on Gloria M. Huffman; (2) charged petitioner and Alice L. Galusha with conspiring to offer a bribe to Miss Huffman to absent herself during the grand jury investigation of the abortion; (3) charged the two with the substantive crime of attempting to bribe the witness (R. 2-4, 10, 49). He was sentenced to imprisonment for twenty months to five years on the first count, and for eight months to two years on each of the other two, to run concurrently after that on the first count had been served (Tr. 758-759, R. 55).

The facts of this case can be stated briefly since the questions presented involve procedural and instructional matters. The evidence of the prosecution tended to show that Andrew Gleeson, in accordance with prior arrangements with petitioner (Tr. 75-78, 249-254), took Miss Huffman to petitioner's house (Tr. 79, 254). She stayed there three days (Tr. 111, 264), being ministered to by one Bessie (Tr. 89, 91, 94-100). Petitioner inserted an instrument (Tr. 82, 87-88) and medicines (Tr. 88) into her body, and thereafter she had a miscarriage (Tr. 100). Gleeson paid petitioner $350

(Tr. 81, 255-256). There was medical testimony that Miss Huffman was pregnant prior to the date of the alleged abortion (Tr. 235-237, 243), and that she thereafter was hospitalized as a result of an abortion (Tr. 321).

Defendant admitted treatment of Miss Huffman (Tr. 428-433) after arrangements with Gleeson (Tr. 422-426), but for a menstrual irregularity. One Bessie White, who said she was cook for petitioner (Tr. 377), remembered Miss Huffman's visit (Tr. 378), but testified that she had brought Miss Huffman meals and had not acted as a nurse (Tr. 379-380). A Dr. Ackiss, in response to hypothetical questions, agreed that the treatment testified to by petitioner was proper for the condition described (Tr. 616-630).

There was also substantial evidence to support the conspiracy and bribery counts in that petitioner had arranged for Miss Galusha to try and stop Miss Huffman from testifying before the grand jury investigating the abortion (Tr. 192), and that, after Miss Huffman had been served with process (Tr. 198), Miss Galusha offered Miss Huffman money to go to California. These conversations were overheard by police officers (Tr. 210, 216-221).

The Court of Appeals unanimously affirmed, and a petition for rehearing *en banc* was denied by that court *en banc* (R. 62).

ARGUMENT

1. During the trial, counsel for petitioner moved for a mistrial on the ground that a juror was taking notes. The court denied the motion remarking that "taking notes is to be encouraged rather than discouraged" (R. 24-25).

There is no merit in petitioner's contention (Pet. 14) that this was error. Every federal court decision in which the question has been discussed has held that the matter of note taking is within the discretion of the trial judge. *Chicago and N.W. Ry. Co.* v. *Kelly,* 84 F. 2d 569, 574 (C.A. 8); *United States* v. *Carlisi,* 32 F. Supp. 479, 483 (E.D.N.Y.); see also *United States* v. *Chiarella,* 184 F. 2d 903, 907 (C.A. 2).[2] Even the old case of *United States* v. *Davis,* 103 Fed. 457, 470 (C.C. W.D. Tenn.), on which petitioner relies, contains a sentence, omitted from petitioner's brief, to the effect that the taking of notes "is perhaps a matter within the discretion of the court, like others of that character."

The view that the matter lies within the discretion of the trial judge accords with modern conditions. The common law rule that note taking was objectionable probably arose from the notion that, in a period when few men could read and write, the ability to take notes might give a juror undue

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[2] State cases to the same effect are collected in 154 A.L.R. 878. The question was raised but not decided in *Agnew* v. *United States,* 165 U.S. 36, 45.

influence. It is hardly likely that this would be true today. As the court said in *United States* v. *Carlisi*, 32 F. Supp. at p. 483:

> There is no legal reason why such notes should not be made by jurors. Judges and lawyers make notes, why not jurors? Certainly the making of notes would better aid their memories and thus enable them to more intelligently consider the evidence.
>
> While it did not happen in this case I see no objection to all jurors, if they desire, making notes which could be used by them to refresh their recollections, when we realize that the purpose of a law suit is to do justice rather than make it a game of chance. The Courts should make progress with the times.

2. Petitioner cites two isolated instances where reference was made to color, and on that basis argues (Pet. 16-17) that the prosecutor was erroneously permitted to appeal to racial prejudice.

During the cross-examination of Bessie White, who testified she was petitioner's cook, the witness stated that she had seen no girls staying at petitioner's house other than his guests and the complaining witness Miss Huffman. Since it was likely that petitioner, being colored, might more customarily have colored guests, and since Miss Huffman was white, it was permissible cross-examination for the prosecutor to ask:

> Q. I meant white girls, like Miss Huffman [R. 28].

No objection to this remark was made by petitioner.

The second reference to color, this time objected to, occurred during the cross-examination of petitioner with reference to arrangements claimed to have been made with Captain Gleeson for the medical care of Miss Huffman. It was obviously pertinent whether the woman mentioned by Captain Gleeson at the time of the purported conversation was the same woman upon whom the abortion was eventually performed. Hence the question:

> Q. Did you ask him whether or not she was a white girl or a colored girl? [R. 29].

The two cited instances afford not the slightest support for an inference that the prosecutor was appealing to race prejudice. Both the complaining witness and petitioner were visible to the jury. It is therefore difficult to understand petitioner's contention that the prosecutor stressed the fact of the difference of color in such a way as to have prejudiced petitioner.[3] Reference to race, where relevant, can be made under circumstances not prejudicial, for example, for identification as in the instant case. *Commonwealth* v. *Velleco,* 272 Mass. 94, 171 N.E. 16; *State* v. *Cohn,* 155 Wash. 644, 285 Pac. 665. For a reversal there must be

[3] The jury consisted of three colored and nine white persons (R. 29).

not only a showing of an improper appeal to racial prejudice, but also injury to the adverse party. *Rosenthal* v. *United States,* 45 F. 2d 1000, 1003 (C.A. 8). No such showing can be made in this case.[4]

3. There is no merit in petitioner's contention (Pet. 18-19) that the trial court's instructions contained error in stressing evidence for the prosecution and failing to give equal stress to that of the petitioner, and in other respects.

A reading of the instructions will show that there was no detailed discussion of the government evidence (R. 31-45). The evidence for both sides was discussed very briefly and actually occupies less than two pages of the transcript (R. 37-40). If the discussion of the prosecution's case exceeds that of the petitioner's, perhaps the explanation lies in the fact that the prosecution case was more voluminous. See *Wheeler* v. *United States,* 165 F. 2d 225, 228 (C.A.D.C.), certiorari denied, 333 U.S. 829. Furthermore a considerable portion of the evidence and of the discussion in the instructions was devoted to the proof of the corpus delicti, that an abortion actually had been committed. None of this evidence directly connected the petitioner with the crime.

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[4] The authority cited by petitioner to support his contention is a dictum in *Viereck* v. *United States,* 318 U.S. 236, referring to a long inflammatory tirade by a prosecutor, unrelated to race, and is hardly relevant here.

Petitioner's defense was that he had not performed an abortion but had treated the complaining witness for a bleeding condition. This evidence was reviewed by the court, without going into the fine medical details of the purported diagnosis and treatment. Petitioner complains that no mention was made of the testimony of Bessie White or Dr. Smallwood Ackiss. Bessie White's testimony did not support the petitioner's defense. She testified that she did not know why the complaining witness stayed at petitioner's home (R. 28). The testimony of Dr. Ackiss had no bearing on whether petitioner had or had not performed an abortion. It was collateral in that it supported petitioner's treatment of the complaining witness, should the jury believe petitioner's testimony that she had first come to his office complaining of bleeding.

The trial judge made no attempt to impress his views on the jury. He was not argumentative, nor was he an advocate. *Billeci* v. *United States,* 184 F. 2d 394, 403 (C.A.D.C.), cited by petitioner, is therefore clearly distinguishable. Here the trial judge made it unequivocally clear to the jurors that the conclusion upon the evidence was theirs to make. Thus he cautioned (R. 33):

> The Court is permitted by law to comment on the facts and on the evidence in order to assist the jury in arriving at its conclusions, but the Court's comments on the facts and on the evidence are not binding on you and

> you need attach to them only such weight as you deem wise and proper. If your recollection or your understanding of the evidence in any particular differs from the Court's recollection or the Court's understanding, then your recollection and your understanding must prevail. Because, the final decision on the facts is solely within your province. My instructions are binding on you only as to the law.

Similar precautionary instructions appear throughout the charge (R. 32-33, 34-35, 39, 45).

Petitioner urges that it was error for the court to instruct the jury that Andrew Gleeson was not on trial for his sins and that attention should be concentrated solely on the question of whether petitioner was guilty or not guilty, and then later to tell the jury that, since Gleeson was an accomplice, his testimony should be received with caution (Pet. 18-19, R. 32, 38). The two statements are in no way inconsistent. Gleeson was not on trial and the jury was correctly told that only the petitioner was on trial. Yet Gleeson by his own testimony was an accomplice, and the court correctly instructed the jury on the law relating to accomplices at the time he mentioned Gleeson's testimony. Both statements were correct.

Petitioner also urges error in that the trial court commented in the charge that "the defendant denies that any miscarriage took place or, in any event, that he did anything to produce it" (Pet. 19,

R. 37). Petitioner in his testimony did not deny that an abortion had taken place, although his not guilty plea did have the effect of requiring the Government to prove that fact. Shortly thereafter in the instructions, the trial court commented: "He denies that he performed an abortion or did anything to induce a miscarriage" (R. 39). When the two comments are read together, and in the light of the precautionary instructions, the possibility of prejudice to petitioner disappears.

4. Petitioner complains (Pet. 20-21) of the court's refusal to give the following requested instruction (R. 30-31):

> The jury are instructed that according to the testimony of Gloria Huffman, while she is not an accomplice strictly speaking, inasmuch as from her own evidence she morally implicates herself in the act, the jury should consider that circumstance as bearing on her credibility.

Petitioner failed to renew his request in his lengthy objection after the instructions had been given.[5]

Petitioner correctly points out that such an instruction was approved in *Thompson* v. *United States,* 30 App. D.C. 352, 362. But nothing in that

[5] It should be noted that petitioner did not comply with Rule 30 of the Federal Rules of Criminal Procedure, in that he failed to point out the supposed error to the court. Merely requesting an instruction is not sufficient. He must renew his request at the end of the charge to raise the point on appeal. *Villaroman* v. *United States,* 184 F. 2d 261 (C.A.D.C.).

decision can be cited as holding that such an instruction must be given if offered. The court, in upholding the refusal to give a stronger instruction, merely stated that the instruction given "was as much as the defendant had a right to expect."

Since the jury here was given an adequate instruction as to determining the credibility of witnesses (R. 34-35), it was within the discretion of the trial judge to refuse a more specific instruction. *Shettel* v. *United States,* 113 F. 2d 34, 36 (C.A. D.C.) (professional detectives); *State* v. *Moothart,* 109 Iowa 130, 80 N.W. 301, 302 (abortion); *People* v. *Barnett,* 99 Cal. App. 409, 278 Pac. 885 (lascivious conduct with female under 14). Many courts go still further, stating that cautionary instructions should apply to all witnesses alike; and that it is erroneous for a trial judge to single out a witness, other than an accomplice, for special instructions regarding credibility. *State* v. *Stemmons,* 275 Mo. 544, 205 S.W. 8, 11 (seduction); *State* v. *Young,* 55 N.D. 194, 212 N.W. 857 (statutory rape); *State* v. *Hanson,* 53 S.D. 205, 220 N.W. 518, 520 (abortion); compare *Bronstein* v. *United States,* 17 F. 2d 12 (C.A. 8) (governmental investigators). The charge of the court as given fairly and correctly stated the applicable rule and was all that petitioner could rightfully demand. A specific instruction as to the credibility of Miss Huffman, if not erroneous, was certainly a matter for the discretion of the trial court.

5. In the poll of the jury, one juror at first replied, "not guilty." When asked to repeat his verdict, he stated: "Not guilty on the first count, but then we weeded it out afterwards." And when the court asked him: "What is your verdict at this time," the answer was, "Guilty." (R. 49-53.) It is evident that the juror was confused and did not mean to dissent from the verdict. The situation is therefore unlike that involved in *Bruce* v. *Chestnut Farms-Chevy Chase Dairy,* 126 F. 2d 224 (C.A.-D.C.). Here there was no argument with the juror, no request for an explanation and no repeated questioning. The trial judge asked the juror to repeat his answer, and the juror of his own volition explained that he meant he had originally voted for an acquittal on the first count.

Furthermore, the trial judge offered to send the jury out for further deliberations in accordance with Rule 31(d) of the Federal Rules of Criminal Procedure, if there was any question in the mind of counsel for petitioner as to their unanimity. Counsel refused to avail himself of the offer, announcing he would stand on the record as it was (R. 52). It seems obvious that counsel realized that the verdict was unanimous and that rather than allow further deliberation, his best tactic was to preserve whatever confusion remained in the record.

CONCLUSION

The judgment below is correct and no conflict of decisions or question of importance is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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